Kanowsky Furniture, Inc. and its alter ego, Herbert N. Zimmerman, Inc., d/b/a Kanowsky Furniture *and* United Furniture Workers of America, Local 262, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO. Cases 20–CA–24086 and 20–CA–24101

June 24, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On August 5, 1993, Administrative Law Judge James M. Kennedy issued the attached decision. The Charging Party filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The recommened Order of the Administrative Law Judge is adopted and the complaint is dismissed.

[1] In adopting the judge's finding that Herbert N. Zimmerman, Inc., d/b/a Kanowsky Furniture, is not the alter ego of Kanowsky Furniture, Inc., we find it unnecessary to rely on the judge's discussion at sec. 4, pars. 15–20 of his decision of the relationship between alter ego theory and bankruptcy law, and his interpretation of *NLRB v. Goodman*, 873 F.2d 598 (2d Cir. 1989). Rather, we agree with the judge that under the criteria set out in *Fugazy Continental Corp.*, 265 NLRB 1301 (1982), the General Counsel did not establish an alter ego relationship in this case.

Donald R. Rendall, Esq., for the General Counsel.
Herbert Zimmerman, President, Herbert N. Zimmerman, Inc., of Sacramento, California, for the Respondent HNZ.
Pamela Allen (Eggleston, Siegel & LeWitter), of Oakland, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried before me in Sacramento, California, on February 9, 1993, on a consolidated complaint issued by the Acting Regional Director for Region 20 of the National Labor Relations Board on February 28, 1992. The complaint is based on two separate charges filed by United Furniture Workers of America, Local 262, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO (the Union) on June 27, 1991 (amended July 31), and on July 9, 1991, respectively. It alleges that Herbert N. Zimmerman, Inc., d/b/a Kanowsky Furniture (HNZ) has committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act or the NLRA).

Issues

The consolidated complaint asserts that HNZ is the alter ego of Kanowsky Furniture, Inc. (KFI). KFI was, until October 3, 1990, a manufacturer and wholesaler of upholstered furniture and, among other things, operated a factory in Sacramento, California. At that time it converted an earlier-filed Chapter 11 bankruptcy petition to a Chapter 7 bankruptcy dissolution. Later, at a public auction conducted pursuant to an order of the bankruptcy court, HNZ purchased a small percentage of KFI's assets, including its trade name, and commenced operating a furniture factory at the same location. As KFI's Sacramento production workers had been represented by the Union, the complaint seeks to declare HNZ the alter ego of KFI and bound to the 1989–1992 collective-bargaining agreement between the Union and KFI. The General Counsel seeks a remedy which would require HNZ to recognize and bargain with the Union, implement and apply the terms of the 1989–1992 collective-bargaining agreement, reinstate and make whole all the employees of KFI which it has not hired and make payments to the union sponsored health and welfare and pension plans retroactive to February 1, 1991, the date HNZ commenced business.[1]

Respondent HNZ asserts it does not meet the test for an alter ego as defined by the Board. It further asserts that the Chapter 7 bankruptcy petition dissolved KFI and therefore, as a matter of law, HNZ cannot be KFI's alter ego.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Counsel for the General Counsel and for the Union have filed briefs which have been carefully considered. HNZ was represented by its president, Herbert Zimmerman, a lay person. He did not file a brief. Based on the entire record of the case, as well as my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

It has been stipulated that both HNZ and KFI are or were California corporations which manufacture(d) upholstered furniture at a factory located at 60 East Main Avenue in Sacramento where whoever operated the plant annually sold and shipped goods valued in excess of $50,000 to customers outside the State. Similarly, the plant also directly purchased goods and supplies valued in excess of $50,000 annually from sources outside California. HNZ admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

HNZ admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] In his brief, the General Counsel has moved to withdraw an allegation that HNZ had failed to provide the Union with a copy of the sales agreement between it and KFI, as he concedes no such document existed, or could it have existed in this context. He has also asked to withdraw a contention that Virginia Kanowsky was a 2(11) supervisor of HNZ. Both motions are granted.

III. ALLEGED UNFAIR LABOR PRACTICES

The facts are not in significant dispute. KFI has had a collective-bargaining relationship with the Union since about 1971. It was a corporation whose stock was solely owned by Carl C. Kanowsky. He was the corporate president. The record does not reflect who the other corporate officers or board members were except that at some point Herbert Zimmerman became the vice president in charge of production.[2] In addition, according to Kanowsky, there were several others who had approximately equal authority with Zimmerman. These were General Manager Bruce Minor, a controller whose last name appears to be Scott,[3] and Sales Manager Charlie Nobeel.[4] Kanowsky denied that Zimmerman was the second highest ranked person at KFI after himself, saying Minor was, though all were considered relatively equal in authority. It does appear that Zimmerman was the person through whom all labor relations matters were funnelled, whether collective-bargaining negotiations or second-step grievance processing. KFI also employed about 25 salesmen, including Ron Hall and 2 foremen, Richard Reilly and Ray Black. Reilly is Kanowsky's former son-in-law. Finally, the record does not reflect the size of the bargaining unit of factory employees at KFI, neither the normal complement nor the number of employees as the bankruptcy began in the summer of 1990.

The Union was aware of KFI's precarious financial position to some extent. In May, according to Union Steward Rene Maxon, she, Union Business Agent Dave Erwin, and Zimmerman held a meeting at the plant. At that time Zimmerman informed Erwin that the Company was in financial difficulty and sought to negotiate a 10-percent wage reduction during a remaining period of the collective-bargaining agreement. Zimmerman explained, inter alia, that KFI was trying to stay in business. The Union's brief concedes that a 10-percent wage reduction was agreed on, although Maxon's testimony does not actually support that concession.[5]

A short time later, according to another business agent, Ulises Vergara, the Union's now-deceased secretary-treasurer, Fred Perez, and he met with Kanowsky and the company controller at a restaurant in Vacaville.[6] Although Vergara was not acquainted with all the circumstances, he says Kanowsky and Perez discussed KFI's arrearage to the health and welfare plan. During the meeting, according to Vergara, KFI presented the Union with a check for some sort of back payment to the plan. The arrearages nonetheless continued. At one point in the record Vergara intimates, but does not exactly say, that he had several conversations with Zimmerman after Perez died regarding money which KFI continued to owe the fringe benefit plans.

At about the same time, July 1990, KFI filed its original bankruptcy petition under Chapter 11 of the Bankruptcy Act seeking protection from its creditors and allowing it to reorganize its finances. There is no testimonial evidence in the record regarding the manner in which KFI continued to operate until the bankruptcy was converted to Chapter 7. There is, however, a letter dated September 28, 1990, from KFI's attorney, Jane Dickson McKeag, to the Union's attorney, Timothy M. Schooley, in which she refers to the fact that KFI during the Chapter 11 period was being operated as a debtor-in-possession. On September 18, 10 days before McKeag's letter, KFI had shut down its business without any advance notice, thereby triggering the Union's concern.

That shutdown had caused Vergara, during a telephone conversation with Zimmerman, to arrange a meeting with Kanowsky and Zimmerman on September 24. During the telephone conversation Zimmerman explained that the shop had closed because the Company was ''broke'' and had no money for the payroll. He said it had to ''claim'' bankruptcy because there ''wasn't any money, period.'' When the meeting commenced on September 24, Vergara asked Kanowsky what the Union could do to help keep the Company going. Kanowsky, perhaps facetiously, asked if the Union had $1 million to help out with the payroll and other things. Vergara replied the Union couldn't do that, but asked if Kanowsky had any other ideas. Kanowsky replied he did not. There is no further evidence regarding what else, if anything, occurred at that meeting.

Subsequently, on October 3, the Chapter 11 reorganization proceeding was converted to a Chapter 7 dissolution. At that time the bankruptcy court appointed John Roberts to be the bankruptcy trustee.[7] Roberts, a lawyer, is a specialist in bankruptcy law and proceedings. The bankruptcy court often uses his services as a bankruptcy trustee. (He also serves in other capacities before that court.) Immediately on his appointment as trustee, Roberts took possession of the premises and began searching for assets with which to pay, under the Bankruptcy Act's priorities, KFI's creditors, presumably including the health and welfare and pension plans. Among other things, Roberts hired KFI's billing clerk to operate the company computer to search out accounts receivable. The principal creditor was a factor, the Citizens & Southern

[2] While the record does not show exactly how long Zimmerman worked for KFI, Kanowsky testified that Zimmerman began as an assistant to the superintendent and eventually worked up to vice president in charge of production.

[3] According to union official, Ulises Vergara.

[4] The court recorder does not appear to have taken any care with respect to the spelling of the names of persons who did not appear as witnesses. The spellings which appear in this decision are based on my notes, even if they differ from those chosen by the transcriber. I trust my notes over the recording Company's efforts. If these are incorrect, I apologize. Any reader of the transcript will note that it is somewhat misindexed and contains numerous errors of various types. I make no effort to correct them, only to make do with what has been provided.

[5] The testimony given by Maxon and Assistant Steward Vicki Smith was taken only as an offer of proof, for they were presented to provide evidence of KFI's (and apparently Zimmerman's) animus against the Union. I ruled that evidence to be not relevant in an alter ego context, at least where there was no contention or evidence that KFI's bankruptcy petition was to deceive the Union. Indeed, the proffered evidence of animus is relatively insubstantial. As the wage matter is only a background item, and because it is not in dispute, I have taken that limited portion of Maxon's testimony to fill in the financial picture.

[6] Perez died shortly thereafter. Until his death he had been the union official primarily responsible to oversee the Union's relationship with KFI. On his passing, Vergara took over that responsibility, later succeeding Perez as the Union's secretary-treasurer.

[7] The General Counsel's brief is in error when it asserts on p. 3 that Roberts was appointed trustee in July. That is the date when the Chapter 11 petition was filed. Roberts had no involvement until the conversion to Chapter 7.

Commercial Bank, which had a secured interest in the accounts receivable.

Since the date Roberts took possession of the factory and all its office equipment, records, inventory, and supplies, Kanowsky has not had any control of the facility, except as a landlord. It appears that Kanowsky, as an individual, did own the real property which comprised the factory. His only dealing with the trustee was to claim rent for the building while the trustee was in possession of it. Sometime later, on a date not shown in the record, Kanowsky sold the building to its current owner.

In January 1991, pursuant to the authorization of the bankruptcy court, trustee Roberts conducted a 3-day public auction to sell all of the saleable assets of KFI in order to turn them into money with which the creditors could be paid. He hired Huisman Auctions, Inc., to perform that task. Although the auction dates are not clear in the record (G.C. Exh. 6) an auction purchase tally, bears a date of January 30, 1991, and requires the purchaser to remove his acquisitions no later than February 2. I presume from those dates that the auction was held in late January. According to Roberts, the auction netted sales of over $1 million.

Shortly after the bankruptcy action was converted to Chapter 7, Zimmerman, who was out of work, took a job with a firm called Stanton Industries in Oregon. He says he, like other employees, filed a claim for back wages with the bankruptcy court. He asserts he had nothing more to do with KFI. As far as he knew, he says, it was out of business. Trustee Roberts, in a somewhat different sense, concurs. He observes that once the Chapter 7 dissolution commences, there is nothing left to do but find assets, distribute them, and close the case. It is virtually an irreversible process.

At some point, Zimmerman and Kanowsky got back together again. They decided to form a new corporation which turned out to be HNZ. The testimony shows that they regard it as an incorporated partnership. They are the only two stockholders and officers. Zimmerman owns 51 percent of the stock and Kanowsky 49 percent, although he seems to have provided Zimmerman with an unsecured loan for $17,000. It is not clear whether that money was used to purchase stock, to fund the corporation, or to assist Zimmerman in some other way.

On the formation of HNZ,[8] Zimmerman became the chief executive officer and Kanowsky the chief financial officer. They both agree that Zimmerman is the more powerful of the two, holding a majority interest in the corporation. It is not clear, one way or another, whether Zimmerman put any money into the corporation over and above the $17,000 which Kanowsky had lent him. Together they apparently put $32,000 into the business. Even so, the day-to-day management of HNZ is clearly in Zimmerman's hands.

Zimmerman and Kanowsky attended portions of the public auction in January 1991, knowing they were going to purchase some of the equipment necessary to operate a factory which would manufacture upholstered furniture, the same product which KFI had manufactured. At that time Zimmerman and Kanowsky, through Richard Reilly, who apparently did the actual bidding, purchased almost $53,000 worth of equipment and supplies for Kanowsky. Kanowsky bought the company automobile for himself. He put the remainder into HNZ. Since the car was valued at $4000, the amount which went to HNZ was $49,000. The purchase, according to the tally, included the rights to the KFI trade name ''Kanowsky Furniture'' (for $1300) and KFI's furniture patents and patterns (for $10,500). The remainder was for equipment and furniture parts. In addition to Kanowsky's purchases, according to a stipulation, HNZ bought at the auction the factory lift truck for $10,000.

It is unclear whether those purchases were made with the $32,000 initial funding or whether the two principals were making additional contributions to HNZ. Obviously, the value of the purchases exceeded the amount of the initial funding by almost $27,000. Whatever the internal arrangements for those purchases were, it is apparent that the two principals purchased only about 6 percent of the assets which were sold at the auction ($1 million divided by $59,000 = 5.9 percent).

The testimony does not show the size of the employee complement at either KFI or HNZ, although HNZ is considerably smaller. It does show that KFI was sufficiently large to employ a sales staff of as many as 25 salesmen and had annual sales of about $20 million. HNZ has five salesmen, only one of whom, Hill, worked for KFI.

It is true that HNZ currently manufactures upholstered furniture at the same location which KFI had used. It also employs the same manufacturing techniques and some of KFI's designs. However, the frames, recliners, parts, and fabrics, as well as the production methods which it follows, are standard in the industry. Some 75–100 other upholstered furniture manufacturers use the same techniques and parts.

HNZ does not currently sell to the same customers which KFI had, although it does sell at wholesale to retail stores as KFI did. Two of KFI's main customers, Furniture 2000 and RB Furniture are out of business. Both were chains of significant size. HNZ did not keep the national account with J. C. Penney which KFI had held; HNZ now has only the J. C. Penney store in Anchorage, Alaska. It does sell to one store in the McMahan's chain, but not the others as had KFI.

As noted, Zimmerman had been in charge of the KFI manufacturing process in his capacity as vice president for manufacturing. As HNZ's CEO he continues to oversee the manufacturing process since it is on a much smaller scale. He also performs the administrative work which falls to that office, something which he did not do at KFI. That was accomplished by Kanowsky. Zimmerman was the person at KFI through whom all collective-bargaining and labor relations matters passed; however, Kanowsky appears to have had the final say. There is no evidence regarding who handles labor relations at HNZ, other than inferring that Zimmerman as CEO does it. It is a small company and it seems likely that he would, but the record is silent on the point. Perhaps the matter has not come up because HNZ has not yet recognized any labor union. It is true that Zimmerman represents HNZ in this litigation, but I do not think too much should be made of that fact. Defending a matter before the Board pro se is not a strong basis for concluding much beyond the obvious, that as CEO he is fending off a lawsuit.

Finally, Reilly is the only line supervisor who has worked in that capacity for both companies. He is and was in charge

[8] There is no evidence in the record which shows when HNZ was incorporated. Since Zimmerman had to find other work after the conversion to Chapter 7, I infer that its incorporation did not occur until well after the Chapter 7 proceedings began.

of fabric cutting, sewing, and cushions. Although there is some testimony that former supervisor, Ray Black has been seen on the premises by former KFI employees, the testimony was credibly denied. There is no evidence that Black is involved in any way with HNZ. There is also some evidence that Virginia Kanowsky, Carl's wife, worked at HNZ for about 3-1/2 months as an office worker. She had no significant prior role at KFI, only accompanying Carl on his business trips to trade shows when KFI was in operation and serving as a company hostess at those events.

Finally, there is some unclear evidence relating to an individual named Pat Driscoll. He worked for KFI in some sort of supervisory capacity. He also owned certain lumber milling equipment. With the opening of HNZ, he became a supplier of certain milled wooden parts. Such parts had previously been supplied to Sacramento from a KFI plant in Virginia. Driscoll seems to serve now in multiple roles. He is both a manufacturer and vendor to HNZ. In addition, he has hire and fire authority within the HNZ operation and serves as some sort of production supervisor over HNZ employees.

IV. ANALYSIS AND CONCLUSIONS

At this point it is appropriate to once again describe the General Counsel's theory, both to note what is included and what is not. First, the General Counsel has clearly stated he seeks a remedy based on HNZ's apparent status as an alter ego. He asserts rather clearly that HNZ is the disguised continuance of KFI. By the same token, he does not contend that HNZ is a successor, under either *Burns*[9] or *Perma Vinyl/Golden State*,[10] nor does he claim that HNZ and KFI are a single employer. He seeks to declare HNZ the alter ego of KFI and thereby bound to the same collective-bargaining contract which KFI had signed with the Union, to require it to reemploy the same employees, paying them back wages from February 1, 1991, when HNZ opened for business to the date they are reinstated, and paying the fringe plans from that date.

Curiously, although the caption names KFI as the predecessor, the complaint does not contend that KFI ever violated the Act in any way. It does not assert that it unlawfully went out of business or that it engaged in any other unfair labor practices, such as failing to properly pay the fringe benefit plans. There is no accusation, much less a finding, that KFI has done anything improper under this Act. Indeed, there is no contention that KFI sought to use the bankruptcy proceeding to avoid its obligations under the NLRA. KFI's only visible purpose to resort to bankruptcy is that which is normally seen, that it had become insolvent and unable to pay its creditors. It made an unsuccessful attempt to reorganize itself financially under Chapter 11 of the bankruptcy act, but on that failure decided to liquidate itself under Chapter 7. When that conversion occurred, Kanowsky was ousted from the premises by trustee Roberts and he had nothing further to do with the winddown. Indeed, about 2 weeks earlier the plant had shut down entirely.

The question may then be posed: Of what entity is HNZ the alter ego? It is true that the Board has held bankruptcy trustees under Chapter 11 of the bankruptcy act to be alter egos; after all they were continuing to operate the business, albeit under court protection. Here, trustee Roberts had no such authority. His only duty was to collect whatever assets he could find and distribute them to the creditors. It has recently been held that a Chapter 7 bankruptcy trustee is not an employer within the meaning of Section 2(2) of the Act and therefore not an alter ego of the prebankruptcy entity. *San Bernardino Dental Group*, 302 NLRB 135 (1991).[11] Therefore, if the entity as it existed prior to the creation of HNZ was not an employer within the meaning of Section 2(2) of the Act, how can HNZ be its alter ego? I think the question answers itself. HNZ cannot be the alter ego of a nonemployer.

Does that mean that the complaint envisions the predecessor to be the entity which preceded the bankrupt estate, the pre-Chapter 7 version of KFI? Apparently so, since there is no other 2(2) employer to be seen. Yet, as noted, there is no contention that this Employer, KFI, has done anything except to fail as a viable business. Furthermore, since the General Counsel contends, as part of his alter ego theory, that HNZ is the disguised reincarnation of KFI, the question which poses itself is why a disguise would be necessary. After all, being forced into bankruptcy dissolution due to legitimate business reverses is not a motive to become deceitful when starting anew. In this regard, I note that one of the factors which the Board considers when determining alter ego status is whether the putative alter ego was created for the purpose of evading responsibilities under the Act. However, before attempting to answer that question, I shall turn to the test for alter ego status as the Board has recited it.

The Board set forth its current test for alter ego status in *Fugazy Continental Corp*., 265 NLRB 1301 (1982).[12] In that case it listed the various factors to which it would look to determine if one employer is the alter ego of another. The test requires an examination of the following factors:

> 1. Ownership; do they have common ownership and management;
> 2. Do they have a common business purpose;
> 3. How does the nature of their operations and supervision compare;
> 4. Do they utilize the same or common premises or the same equipment;

[9] *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), holding that a successor employer is obligated to recognize and bargain with the union representing the predecessor's employees, but does not have to assume the predecessor's collective-bargaining contract with that union.

[10] *Perma Vinyl Corp*., 164 NLRB 968 (1967), enfd. sub nom. *United States Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968); *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), holding a successor employer liable to remedy the predecessor's unfair labor practices in certain circumstances.

[11] The General Counsel has cited a case holding that a Chapter 7 trustee is liable under the Act. A similar case is relied on and cited therein. Both are summary judgment cases where inadequate answers were filed to the complaint. The issue of the trustees' status was not litigated as in *San Bernardino*. I regard both those cases, *Institute of Technical Careers*, 279 NLRB 811 (1986), and *Ohio Container Service*, 277 NLRB 305 (1984), to have been superseded or sub silentio overruled by *San Bernardino*. Even if not, they were decided on procedural grounds whch do not apply here. They are certainly not binding precedent on the issue of whether a Chapter 7 trustee is an employer under the NLRA.

[12] Also see an earlier case, *Crawford Door Sales*, 226 NLRB 1144 (1976).

5. Do they have customers in common; i.e., is it the same business in the same market;

6. What is the nature and extent of the negotiations and formalities surrounding the transaction;

7. Was the putative alter ego created for legitimate purposes or was it to evade responsibilities under the Act.

None of these factors by itself is controlling. They are to be taken as a whole and a determination made based on the totality of the answers.

Most of the factors may may be dealt with rather rapidly. With respect to ownership, it has been shown that Kanowsky was the sole owner of KFI. He is only a minority holder in HNZ. The majority owner of HNZ is Zimmerman who had no ownership interest in KFI. There is an unclear debt relationship between Zimmerman and Kanowsky, apparently an unsecured loan of $17,000 made at the time HNZ was formed.

Both KFI and HNZ have the same business purpose, the manufacture of upholstered furniture and selling the product at wholesale to retail stores.

The nature of their operations and management is markedly different. First, HNZ is much smaller than KFI. Second, Zimmerman has administrative responsibilities with HNZ which he did not have with KFI. Kanowsky is now the chief financial officer of HNZ. Previously he had been the corporate president of KFI; financial responsibilities at KFI rested with another. Supervision is somewhat different. Zimmerman was and is responsible for production at both companies. However, he has the added administrative duties mentioned above. One of the first-line supervisors, Reilly, holds the same job at HNZ which he held at KFI. Another supervisor, Driscoll, seems to have become a combination supervisor/entrepreneur at HNZ; his KFI duties have not been clearly shown.

Both businesses are or were conducted from the same premises. And, although at least some of the equipment, patterns and designs are the same, HNZ purchased them at the bankruptcy auction. Moreover, the market and customers are somewhat different. Due to the smaller volume of production at HNZ, it has not sought to sell in the same quantity to large retail chains. Some of KFI's major customers no longer exist. I think it is fair to conclude that although HNZ is in the same business as KFI, it is not in the same market.

The formalities of the ''transition,'' if it may even be described by that word, are forceful. Some of the initial equipment, including the trade name, the patents and designs were purchased on the open market at a bankruptcy court ordered public auction. Even so, the purchase consisted of only about 6 percent of the entire sale offering. HNZ did not acquire KFI lock, stock, and barrel. It only purchased a small portion. The remainder of the bankrupt estate went to unrelated purchasers, and the amount HNZ did purchase came not from KFI, but from the bankruptcy trustee. This is an arm's length transaction in its purest sense. It could not be more formal.

Finally, there is no evidence that KFI, through Kanowsky, was attempting to evade its responsibilities under the Act by filing for bankruptcy—either its initial Chapter 11 filing or its subsequent conversion to Chapter 7 liquidation. Even if one assumes, as the General Counsel does, that unionization can become a burden significant enough to motivate an employer to want to oust it as the employees' representative, it does not follow that such an employer would allow its creditors to swallow it whole, the necessary result of a Chapter 7 proceeding. If bankruptcy proceedings were being used as a means of evading NLRA responsibilities, Chapter 11 would be the more likely vehicle, as it would allow for reorganization and continued existence. Chapter 7 has the unfortunate result of throwing the baby out with the bath water. It is most unlikely that a large employer would do that simply to avoid a union with whom it has dealt for many years. It would resort to that step only if it had no other choice. Zimmerman's remark to Vergara in their September telephone call suggests exactly that—''We're broke . . . [there isn't] any money, period.'' That was followed by Kanowsky's plea for $1 million during the meeting itself, additional evidence that Chapter 7 was an imperative.

Second, HNZ made no attempt to disguise itself on its formation. It knew its most valuable asset was the Kanowsky Furniture trade name and it intended to use it to advantage. That name carried a reputation within the industry which was easily recognizable, not only to attract potential customers, but by the very union with whom the predecessor had had a long relationship. The name hardly offered refuge from the Union unless one thinks HNZ was hiding in plain sight. Beyond that, HNZ was in exactly the same physical plant as the predecessor.

Thus, the likelihood that HNZ was created to evade the Union is very low. I recognize, however, that there still exists the bare possibility that the Chapter 7 proceeding was used to circumvent KFI's obligations under the NLRA. If so, it was the General Counsel's duty to present proof that the Chapter 7 proceeding was fraudulent—not only on the Union, but on the bankruptcy trustee. Assets would have to be hidden from the trustee and would thereafter have to be reentered into the alter ego. Trustee Roberts said he had no reason to believe that asset secreting or bidding collusion at the auction had occurred; he had even taken a second look because of the instant action.[13] In addition, the General Counsel has not even offered independent evidence of misconduct of that nature.

Absent some proof that fraud has occurred, I can find no warrant to conclude that the Chapter 7 proceeding was anything but regular. I should note here that bankruptcy proceedings are considered to be both *in rem* and *in personam*, depending on what the sought-for order is.[14] It is true that under that statute (the 1978 amendments) corporations are not discharged from debt, only liquidated.[15] Even so, the procedure notifies the world, for it is *in rem*, that the business life of the debtor corporation has ended. The Union here

[13] Roberts, as trustee, had hired an accountant and appears to have had access to KFI's general ledger. He was also aware that HNZ had purchased assets at the auction. To his view, HNZ was making a permissible ''clean start,'' consistent with the rehabilitative aims of the Bankruptcy Act.

[14] See Cowans, *Bankruptcy Law and Practice* (1987), Vol. 1, ch. 1, § 1.2 at 16, ''Bankruptcy Court & Jurisdiction.'' The author quotes the legislative history of bankruptcy code § 1471(b) (now § 1334(a)) as saying: ''The bankruptcy court is given in personam jurisdiction as well as in rem jurisdiction to handle everything that arises in a bankruptcy case.''

[15] 11 U.S.C. § 727(a)(1).

actually knew that on an *in personam* basis, as its members are wage claimants, as well as on *in rem* grounds. The Board is charged with knowledge on an *in rem* predicate. By that observation I do not say that the corporation has been dissolved as a legal entity. That is a matter for the incorporating authority, the state of incorporation.

In this regard, I do not regard the *Goodman* case[16] to be particularly helpful. First, that case involved successorship issues which fall into the *Perma Vinyl/Golden State* successor category. The predecessor corporations there had been found guilty of unfair labor practices which had not been remedied before they and the owner, *Goodman*, sought Chapter 7 relief. Under that category, the court found the Board was entitled to determine if the successor was one which should be obligated to provide the remedy. That is quite unlike this case where the predecessor has not even been charged with, much less found to have committed, unfair labor practices. This case does not involve *Perma Vinyl/Golden State* remedy issues. The court does use the term ''alter ego'' but in a remedial context. It does not define the term very well, but because it is speaking of remedying the prior unfair labor practices of the other corporations, I conclude it was using the term relatively interchangeably with ''successor'' in the *Perma Vinyl/Golden State* sense. If one does not define it that way, then the case defies logic. Compare the case which it cites, *NLRB v. Better Bldg. Supply*, 837 F.2d 377, 379 (9th Cir. 1988). Accordingly, I do not believe *Goodman* assists in resolving the alter ego issues presented here.

Second, one of the three Chapter 7 bankruptcy proceedings on which the respondent relied in *Goodman* was a personal discharge. It necessarily did not affect the newly formed corporation. There is no personal discharge involved here.

Finally, the court observed that no conflict between the two acts would occur so long as the Board did not seek to make *Goodman* personally liable for his prebankruptcy petition conduct. It is only on that point that *Goodman* offers any assistance. The alter ego theory as applied here necessarily looks back to the prepetition status of the employer. The General Counsel points to the old collective-bargaining contract and seeks to apply it to the alter ego on a prospective basis. It is at that point that the *Goodman* court would have difficulty. It said: ''It is possible that in resolving the successorship issue the Board, though ostensibly examining post-petition conduct, might take into account some aspect of pre-petition conduct. If that occurs and remains uncorrected on a petition for review, the exercise of the Board's jurisdiction would to that extent have made an inroad on the jurisdiction of the Bankruptcy Court.'' 873 F.2d at 603.

The risk the General Counsel takes by insisting upon an alter ego, as opposed to a *Burns* or a *Perma Vinyl/Golden State* successor, theory is that by definition, the alter ego is deemed to be the same entity as the predecessor, usually in disguised form. If that is so, then in determining the alter ego status of the new company, the Board must necessarily look to the predecessor to compare it with the new. If, in order to do that, it must climb over a Chapter 7 bankruptcy proceeding, it will encounter a significant hurdle. *Goodman* holds in a remedial successorship context that can be done. It is certainly easier to do it now that corporations no longer receive a discharge of their debts.

But alter ego is different. In the context presented here the General Counsel assumes that the debtor has done something deceitful; that it has used the bankruptcy proceeding to evade obligations under the Act. That assumption is untenable, for a Chapter 7 action must be presumed to be regular. It is a court procedure entitled to respect under both article I, Section 8 and article III of the Constitution.[17] I think it likely that the *Goodman* logic would bar that reach, even though if allowed perhaps all it would find would be a collective-bargaining contract in disuse, disabled by the lack of employment. On that latter point, see *J. I. Case Co. v. NLRB*, 321 U.S. 322, 334 (1944) (collective-bargaining contracts only regulate employment, they are not contracts of employment). Also see *NLRB v. Better Bldg. Supply*, supra, which takes a different tack, that a corporate obligation created by violating the NLRA survives Chapter 7, awaiting only the corporation's recommencement of business before it can be collected.

Those cases do not squarely answer the question of whether a collective-bargaining contract which has not been breached, or a collective-bargaining relationship which has not suffered any unfair labor practices, survive Chapter 7 dissolution. However, I need not squarely decide that issue, although I must say that the Board cannot entirely ignore the intervention of that process. In this regard, former Member Penello made some cogent remarks in his dissent in *International Technical Products*, 249 NLRB 1301, 1304–1307 (1980), regarding the comity which the Board should give proceedings under the bankruptcy act. Whatever the final balance between the two acts may be, totally ignoring regular bankruptcy proceedings is not it.

It is enough here that the *Fugazy Continental* alter ego rules have been invoked and the facts measured against them. In doing so, I conclude that the General Counsel has not demonstrated that HNZ is the alter ego of KFI. I specifically note and rely on the Board's analyses in *Gilroy Sheet Metal*, 280 NLRB 1075 (1986), and *First Class Maintenance Service*, 289 NLRB 484 (1988). In *Gilroy* the original firm had been owned by a wife, although the husband was in fact the principal operator. It had been put in the wife's name for the purpose of avoiding a union rule against members owning businesses. The business began to fail, illness befell them both and marital difficulties ensued. After they separated, the husband opened the putative alter ego an as nonunion contractor. It was his trade and the only way he knew to make a living. The Board found the new company not to be an alter ego as there was a different owner and there was no hostility toward the union as no attempt to evade had been shown. The new firm had been created as a result of the divorce and the failing health of the previous owners. Furthermore, it took over none of previous company's work. With respect to the formality of the change, although the separation did not divide the company (the wife dissolved the it 3 months after they separated), it did create an entirely new atmosphere for the establishment of a new company. That is

[16] *In Re Goodman; Goodman v. NLRB*, 873 F.2d 598 (2d Cir. 1989).

[17] Under the Bankruptcy Amendments and Federal Judgeship Act of 1984 (28 U.S.C. § 151 et seq.) the bankruptcy courts are established as ''a unit of the district court.'' As such they serve as a unit of an art. III court.

not unlike the new atmosphere brought about by the Chapter 7 bankruptcy here.

First Class Maintenance, supra, even more strongly favors a finding of no alter ego. In that case, a property manager told its unionized janitorial service that its next bid would have to be on a nonunion wage rate basis. The owners of the janitorial service knew they would not be able to match the bid of a nonunion competitor. Their 20-year-old son, employed as a supervisor and who had 6 years' experience in the field, decided to bid on the job himself, creating the new company to do it. His parents donated $2500 in equipment and he provided $3200 of his own savings. He operated the business from his parents' home, hiring some of the parents' employees but others of his own. Despite the fact that his firm met many of the *Fugazy Continental* commonalty tests, the Board held that the new firm was not the alter ego of the unionized firm. The Board noted that the second company was created for legitimate purposes, the ownership was different (even though there was a family relationship and the parents supported their son financially but were not shown to have had economic control) and there was no evidence that the new firm was created to evade responsibilities under the Act. I also note that the son's firm, like HNZ, seemed underfunded. However, underfunding itself is not a concern except to the extent it may indicate an evasive purpose. In neither case is there any other evidence of such a purpose.

In *First Class Maintenance*, supra, the Board also cited *Victor Valley Heating & Air Conditioning*, 267 NLRB 1292 (1983), as support for dismissal of the alter ego claim. However, that case, at 1297, also stands for the proposition that if there is no perceived benefit to the predecessor from the creation of the putative alter ego, that fact also mitigates in favor of rejecting the alter ego contention. I note here that there is no evidence that KFI, or Kanowsky personally, obtained a benefit by KFI's being dissolved in Chapter 7. Therefore, following *Victor Valley*, I find that the absence of proof of benefit to the predecessor favors a finding that no alter ego exists here.

After weighing all the factors, it appears to me that the General Counsel has failed to demonstrate that HNZ is the alter ego of KFI. There simply are not sufficient common circumstances to show that there is any continuity, much less a disguised continuance of the business.

Based on the foregoing findings of fact and analysis, I hereby make the following

CONCLUSIONS OF LAW

1. Respondent Herbert N. Zimmerman, Inc., d/b/a Kanowsky Furniture is an employer within the meaning of Section 2(2) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to prove that Herbert N. Zimmerman, Inc., d/b/a Kanowsky Furniture is the alter ego of Kanowsky Furniture, Inc.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The complaint is dismissed.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.